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ABSTRACT

Federal laws and regulations designed to assure equal employment opportunities have only recently been applied to faculty employment, but they have rapidly become an important issue in higher education. The goal of true equal employment opportunity has been pursued in court cases and legislation for many years, principally in the industrial sector, where efforts have been focused on the employment of blue-collar workers, particularly racial minorities. Federal agencies, courts, and universities are therefore breaking new ground when they translate the experience of the industrial sector to employment practices affecting professional university workers. This document describes federal laws that apply to faculty employment: Title VII of the Civil Rights Act of 1964, as amended; Executive Order 11246, as amended; the post-Civil War civil rights laws; the Equal Pay Act of 1963, as amended; and Title IX of the Education Amendments of 1972. The regulation implementing these laws is examined and the policies and practices that have developed from interpretive case law are explored. This document also reviews the impact that these laws have had on university personnel policies and the implications of the laws for future changes in faculty employment. (Author/KE)

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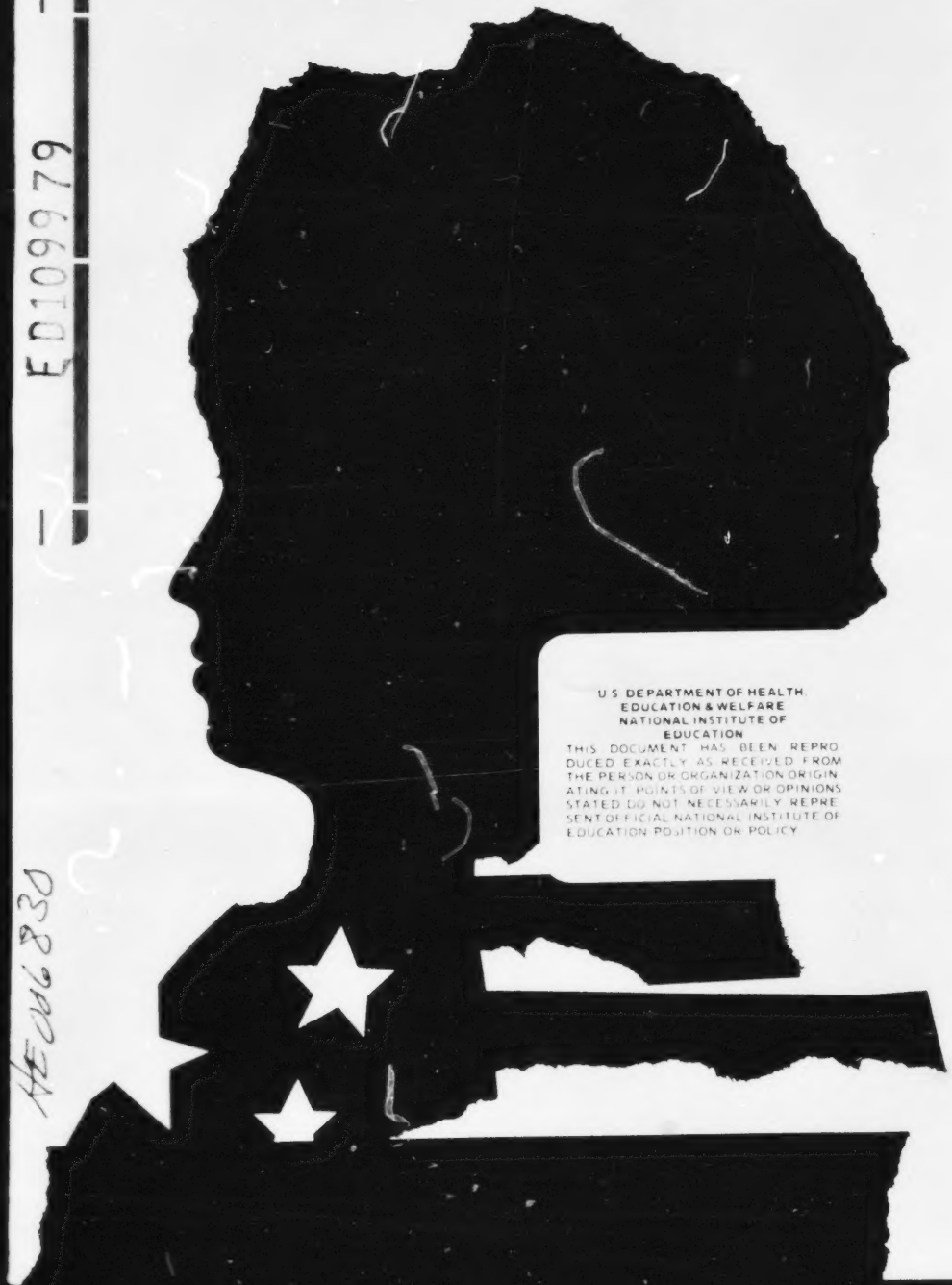
Federal Laws: Nondiscrimination and Faculty Employment

Carol Herrnstadt Shulman



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Carol Herrnstadt Shulman

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Foreword

Over the course of the last several years, colleges and universities have come under increasing government regulation of their employment practices. Initially, administrators focused their attention on the Department of Health, Education, and Welfare and its administration of Executive Order 11246, which bars sex discrimination in employment by government contractors. In the last three years, schools have begun to recognize the impact of the Equal Employment Opportunity Act and the extension of the Equal Pay Act, both of which were enacted into law in 1972. Many of the employment discrimination problems encountered by colleges and universities under the Executive Order are returning, accompanied by a host of new issues brought about by the expanded authority of the Equal Employment Opportunity Commission and the Wage and Hour Division of the Department of Labor.

In the light of the expanded regulatory activity, higher education would be well advised to anticipate potential complaints from both employees and applicants. Equity, as well as federal legislation, demands that a policy of nondiscrimination be maintained in employment practices. Although this paper focuses on the unique problems of colleges and universities with respect to employment practices, it must be remembered that higher education institutions, in their procedures as well as their products, have a unique impact on society and its development in general. It would, therefore, be appropriate for colleges and universities to take the initiative in promulgating nondiscriminatory employment practices and not wait for courts or administrative agencies to determine their internal policies. Such a stance will ultimately benefit colleges and universities as well as the public at large.

Sheldon Elliott Steinbach
Staff Counsel and Assistant Director
Office of Governmental Relations
American Council on Education

Preface

This paper explores the relationship between federal laws, regulations, and court decisions pertaining to nondiscrimination and faculty employment in higher education. This includes a discussion of Title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, as amended, the post-Civil War civil rights laws, the Equal Pay Act of 1963, as amended, and Title IX of the Education Amendments of 1972. At issue is the question of how federal jurisdiction over faculty employment will affect the character of institutions of higher education. The author sees the progress of equal employment opportunity occuring at a slow pace because of adverse economic conditions, the inherently reflective pace at which institutions of higher education move to change standards of faculty employment, retention, and promotion, and the deliberate manner that presently characterizes federal procedures for implementing social goals. Carol Herrnstadt Shulman is a research associate at the ERIC Clearinghouse on Higher Education.

Peter P. Muirhead
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Contents

Introduction 1
What the Laws Require and How They Operate 3
Title VII 3
Executive Order 11246 7
The Post-Civil War Civil Rights Laws 9
Equal Pay Act 11
Title IX, Education Amendments of 1972 13
Summary 14
Applying the Laws to Faculty Employment 16
Recruitment and Hiring Requirements 16
Affirmative Action in Recruitment and Hiring 20
Reappointments, Promotion, and Tenure 22
Financial Exigency 27
Other Conditions of Employment 32
Equal Pay 32
Retirement Plans 33
Maternity Benefits 36
Conclusion 39
Bibliography 41
Tabular Summary of Federal Laws and Regulations Concerning Sex Discrimination in Education Institutions 46

Introduction

Federal laws and regulations designed to assure equal employment opportunities have only recently been applied to faculty employment, but they have rapidly become an important issue in higher education. By 1972, colleges and universities were already subject to affirmative action requirements under Executive Order 11246, as amended, for ending discriminatory employment practices. They also had experience with law suits filed by faculty members under 42 U.S.C. §1983, a statute that gives individuals a legal remedy for denial of equal protection under the law.

New laws enacted in 1972 greatly increased the opportunities for the federal government to scrutinize faculty employment practices. Most significant among these laws is the Equal Employment Opportunity Act of 1972, which amends Title VII of the Civil Rights Act of 1964 by, among other things, extending its coverage to include previously exempt employees of educational institutions. In addition, Title IX of the Education Amendments of 1972 prohibits discrimination by sex for students and employees at most institutions receiving federal funds, and it also amends the Equal Pay Act of 1963 by extending coverage to professional employees. Together, these laws give faculty members with alleged grievances an arsenal of methods for resolving their employment problems outside the university's traditional procedures.

Underlying these laws is the desire for implementation of true equal employment opportunity. This goal has been pursued in court cases and legislation for many years, principally in the industrial sector, where efforts have been focused on the employment of blue-collar workers, particularly racial minorities. Federal agencies, courts, and universities are therefore breaking new ground when they translate the experience of the industrial sector to employment practices affecting professional university workers.

This report will describe federal laws that apply to faculty employment: Title VII of the Civil Rights Act of 1964, as amended; Executive Order 11246, as amended; the post-Civil War civil rights laws; the Equal Pay Act of 1963, as amended; and Title IX of the Education Amendments of 1972. The regulations implementing these laws will be examined and the policies and practices that

have developed from interpretive case law will be explored. This paper will also review the impact that these laws have had on university personnel policies and the implications of the laws for future changes in faculty employment.

What the Laws Require and How They Operate

The federal interest in nondiscriminatory treatment in employment has its origins in post-Civil War civil rights laws that require equal application of the laws to all citizens. However, it was not until the civil rights movement in the 1960's that the federal government began to enforce equal employment opportunity in private industry. Later, as amended, federal requirements extended the government's authority to virtually all areas of public and private employment.

Title VII

Of all the laws, Title VII has the greatest potential for significantly influencing faculty employment practices because of its broad coverage and enforcement powers. It reflects the Congress's belief that "the problems of employment discrimination [are] a major national interest and concern, and one that must be quickly attacked and eliminated" (Sape 1974, p. EEO-5). Until 1972, educational institutions were exempt from coverage under Title VII, but during the Congressional debate on the Equal Employment Opportunity Act of 1972, which amends Title VII, no justification was found for maintaining this exemption. Instead, Congress found cause to eliminate it:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotyped categorizations which in turn would lead to future patterns of discrimination (Steinbach and Reback 1974, p. 26, quoting Senate Committee on Labor and Public Welfare S. Rep. No. 415, 92d Cong., 2nd Sess.)

The 1972 Equal Employment Opportunity Act also extended coverage to professional employees who previously were excluded from the scope of Title VII. Thus, all employees of educational institutions[1] are now subject to the provisions of Title VII.

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[1] Section 702 of Title VII exempts from coverage "a religious . . . *educational institution* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . *educational institution* . . . of its *activities*."

Title VII is a very pragmatic law. The law does not allow an employer simply to declare that it does not discriminate on any prohibited basis. Instead the law is concerned with whether or not discrimination does in fact occur as a result of the employer's personnel practices. Section 703 of Title VII states that an employment practice is prohibited if it:

> (1) results in a failure or refusal to hire any individual because of such person's race, religion, color, sex, or national origin.
> (2) results in the discharge of any individual because of such person's race, color, religion, sex or national origin.
> (3) differentiates between individuals with respect to compensation, terms, conditions, or privileges of employment because of such person's race, color, religion, sex, or national origin.
> (4) limits, segregates, or classifies employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affects such persons' employment status, because of such persons' race, color, religion, sex, or national origin (Sape 1974, p. EEO-7).

Section 703(j) also contains an important prohibition *against* the granting of preferential treatment to "protected" groups

> . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of [such] persons . . . in any community, State, section, or other area, or in the available work force. . . .

The 703(j) prohibition applies to college and university affirmative action plans. For example, a recent Equal Employment Opportunity Commission decision held that a community college could not give preferential treatment to a person because of race under its affirmative action plan. The Commission observed that such programs "must be administered in a manner legally consistent with the non-discriminatory principles of Title VII and other anti-discriminatory statutes and orders" (in Steinbach and Rebach 1974, pp. 39-40).

The Equal Employment Opportunity Commission (EEOC) was created under section 705(a) of Title VII to implement the provisions of the law, and it draws some of its strength from the fact that it is an independent commission whose only responsibility is to enforce Title VII. The Commission has five presidentially-appointed members who serve five-year terms. By law, no more than three members of the Commission may be of the same political party.

The Commission, with a national office, ten regional offices, and

thirty-four district offices, investigates complaints of individual discrimination that may be filed by an individual employee, one of the commissioners, or by any organization on behalf of another person. In addition, the Equal Opportunity Employment Act of 1972 gives the Commission new authority to investigate and act upon pattern and practice complaints filed by or on behalf of an aggrieved employee or by a Commission member. (§707(e)). These complaints allege that pervasive discrimination occurs in the employing organization. The charging party need only provide very general information as to the alleged discriminatory practices, e.g., "I was fired because of my race," giving only the date and place of the alleged action (Sape 1974, p. EEO-18).[2] The charge must be filed within 180 days of the alleged discriminatory practice, but where an employer continues an alleged discriminatory practice the date of the charge is considered the last date of the practice, and so the filing date for the complaint may be extended. The EEOC notifies the employer of the charge within 10 days after it is filed, giving the date, place, and circumstances of the charge. The EEOC may withhold the name of the charging party from the employer, and the names of parties involved in the case are not made public unless the case goes to court.

Upon receipt of a charge, the EEOC determines its legal and jurisdictional sufficiency and either refers it to a state Fair Employment Practice agency or gives it to an investigator. (If given to a state agency, the EEOC will withhold its processing of the complaint for 60 days, after which it may choose to process the complaint or to leave it with the state agency.) The EEOC's investigation may include on-site review, testimony, and the copying of pertinent documents. This investigation can be wide-ranging in its review of an employer's personnel practices. Sape points out that EEOC investigators

> . . . are not limited to the specific allegations of the charge and may ask for very broad and seemingly unrelated material. The rationale behind the breadth of these investigations lies in the general proposition that discrimination is by its nature systemic, and may involve a class action. Therefore, in order to properly evaluate the discriminatory effect of a particular practice, the investigator must look to general employer practices and their relationship to the existing charge to determine what constitutes the violative behavior (1974, p. EEO-20).

College officials are particularly concerned about the possibility of a large-scale investigation of discriminatory employment practices be-

[2] This discussion is based chiefly on Sape's description of Title VII procedures, pp. EEO 17-EEO 22.

cause the confidentiality of faculty records, containing candid evaluations upon which employment decisions are based, may be violated in the process. While the courts prohibit the EEOC from "fishing expeditions," a respondent employer has limited power to determine what it can withhold from an EEOC investigation (Steinbach and Reback 1974, p. 28).

If an investigation shows that there is reasonable cause to believe discrimination has occurred, the EEOC initiates a conciliation process between the charging party and the employer. The conciliation process is "a private and confidential attempt at charge resolution" involving the charging party, the employer, and an EEOC conciliator (Sape 1974, p. EEO-20). By law, this process remains confidential. If the parties cannot reach an agreement during the conciliation process, the EEOC will terminate it. The Commission then determines whether it should bring the case to trial. The EEOC's ability to litigate is a new and powerful enforcement tool given to it by the 1972 amendments (§706(f)(1)).

In addition to these processes, Title VII permits an individual complainant to initiate a private lawsuit after specific actions have occurred. This private right to sue means that an employer may be subject to both EEOC procedures and a civil suit at the same time. The employee, however, must request a "right to sue" letter from the EEOC before filing suit if any of the following conditions are met: (1) a suit is brought by the EEOC or the Justice Department that involves the employee; (2) the EEOC dismisses the employee's charge; (3) 180 days have elapsed since the charge was filed; and (4) the complainant is not satisfied with the conciliation agreement.

Private suits may be of particular importance to aggrieved college faculty members because of the substantial case backlog that the EEOC currently has. At the present time there are approximately 85,000 cases to be investigated by EEOC (of which about 1,500 are against colleges and universities) and some observers predict that this backlog will increase to 250,000 cases by 1980 (LaNoue 1974b, p. 45). With this burden, the EEOC has initiated a track system that gives first priority to national employers with a large number of employees. However, some higher education cases will be reviewed to "establish internal policies and judicial procedures" (LaNoue 1974b, p. 45). By using their private right to sue, college faculty members can probably have their cases heard in court before the EEOC can reach decisions on them.

If a federal court hears a Title VII case and decides for the em-

ployee, it has broad powers to order changes in the employer's employment practices in order to ensure nondiscriminatory treatment in the future and to provide relief to the plaintiff. Section 706(g) of Title VII provides:

> . . . the court . . . may order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate.

Since Title VII cases are matters of equity, the courts have great freedom to develop their own plans for remedying the effects of discriminatory practices. For example, a court may establish numerical or percentage goals so as to correct deficiencies caused by past discrimination (Sandler 1973, p. 628), and at the same time order changes in the employer's practices so that future discrimination will be avoided.

Executive Order 11246

Executive Order 11246, as amended, is perhaps the most widely recognized and most controversial federal regulation in the area of faculty employment. The original Order was issued in 1965 to bar federal contractors from discriminating on the basis of race, religion, color, or national origin. Executive Order 11375, issued in 1967 (effective one year later), amended Executive Order 11246 by including sex among the prohibited discriminations. Under the Order, every federal contract must include the following provision:

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment . . .; rates of pay or other forms of compensation. . . .

The Department of Labor is responsible for administering the Order, but has delegated enforcement powers and responsibility to the Department of Health, Education, and Welfare for all higher education institutions. The Office for Civil Rights in HEW's Higher Education Division enforces the affirmative action requirements of the Order, but must conform to the Department of Labor regulations implementing the Order. Under Department of Labor regulations

41 C.F.R. 60-2.1, all institutions having a federal contract of $10,000 or more must agree to abide by the provisions of the Order. In addition, all institutions having 50 employees and $50,000 or more in federal contracts are subject to the affirmative action requirements established by the Department of Labor to implement the Order. It is important to note that an entire university is subject to the requirements of the Order, although only one department in the university may hold the contract covered by the regulations.

Private and public institutions affected must have written affirmative action plans on file that satisfy the affirmative action regulations developed by the Department of Labor. Revised Order No. 4, issued in 1971, details the information that must be included in any affirmative action plan developed by any federal contractor. Institutions must:

1. develop a data base on all job classifications;
2. have a policy statement forbidding discrimination;
3. appoint an individual to be in charge of the program;
4. examine recruiting, hiring, promotion policies, salaries, and all other conditions of employment;
5. identify areas of underutilization and develop specific plans to overcome these areas;
6. develop numerical goals and timetables (Sandler 1973, p. 617).

The institution must hold this information available for a compliance review conducted by a regional office of the Office of Civil Rights (OCR). Compliance reviews are scheduled:

(1) as a pre-award review before a college or university can be awarded a contract of $1 million or more;
(2) by the Office of Federal Contract Compliance (Department of Labor) as "a result of a broader compliance review of information indicating to OFCC that 'a problem of discrimination may exist within the institution's work force'" (Hanson and Pondrom 1974, p. AFA-4);
(3) as a result of complaints "seeking relief for an affected class as well as general allegations of patterns of discrimination at an institution'" (Hanson and Pondrom, p. AFA-4); Individual complaints of discrimination filed with HEW are turned over to the EEOC for investigation under a 1972 agreement between the two agencies;
(4) under the Office for Civil Right's program of regular reviews of the "'employment practices of contractors for which it is assigned responsibility'" (Hanson and Pondrom, p. AFA-4).

A compliance review brings federal investigators on campus and requires college administrators to turn over personnel records for examination, raising the same concerns about access to confidential information that arise under Title VII investigations.

After an investigation is completed, the HEW regional office con-

ducting it presents a "letter of findings" to the head of the institution during an "exit" conference (Sandler and Steinbach 1972). The institution has 30 days after the date of the exit conference to develop a written plan to correct any "deficiencies" reported in the letter of findings. The univeristy plan must be approved by the HEW regional office and by the national OCR headquarters in Washington.

If the Office of Civil Rights determines that an institution's affirmative action plan does not meet the Department of Labor's requirements, it can delay the award of new contracts of $1 million or more to that institution without providing due process proceedings first. Under the Executive Order, Part 1 (d)(5), HEW may after formal proceedings*:

> Cancel, terminate, suspend . . . any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

Universities have experienced "freezes" on the award of new contracts of $1 million or more. Columbia University, for example, experienced a "freeze" on new contracts from November 3, 1971, through February 29, 1972, when HEW accepted an interim action plan. The university's attorney speculates that the institution may have also lost potential new contracts because agencies may not have considered Columbia while it was under the freeze (Wheeler 1972). Moreover, the Office of Civil Rights has never invoked the contract cancellations against any institution, despite findings of noncompliance with the Executive Order. Instead, it has chosen to continue negotiations with institutions over extended periods of time until a plan satisfactory to the Office for Civil Rights has been developed.

The Post-Civil War Civil Rights Laws

After the Civil War, Congress enacted a series of laws that extended equal rights to all citizens and provided methods of redress if these rights were abridged or denied. The laws are now codified in 42 U.S.C. §1981, 1983, and 1985. Unlike Title VII and Executive Order 11246, these statutes do not specify protected classes, but apply

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* 3 The Formal hearings provide the prime contractor with an opportunity to answer and rebut the charges against him. He may be accompanied by counsel. However, the Director of OCR may suspend the contractor's contracts during the pendency of his hearings (41 C.F.R. 60-1.26 (b) (2) (iv), cited in Hanson and Pondrom 1974).

equally to all citizens,[1] and therefore may be used by white male faculty members as well as minority groups and women. They also may be more advantageous than other laws for some faculty members because they provide for direct redress in court without the need to pursue administrative remedies first.

Of the three statutes, the most widely used is 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute has multiple uses. Most obvious is its application in cases of racial or sex discrimination, as in the case of *Green v. Board of Regents of Texas Tech University*, 474 F. 2d 594 (5th Cir. 1973), where a female faculty member charged that she was denied promotion to full professor because of her sex. In *Johnson v. Board of Regents of the University of Wisconsin* 337 F. Supp. 227 (W.D. Wis. 1974), aggrieved male faculty members charged that they were denied due process of law when they were "laid off" from tenured faculty positions due to severe budgetary problems. In both instances the plaintiff faculty members lost on the merits of their cases, but §1983 was considered applicable to that type of complaint.

It should be noted that while §1983 generally will apply only to employees of public institutions, there might be circumstances under which faculty members employed at private colleges and universities would be covered.

Such a situation might arise if a private institution was found to be involved in "state action." "State action" is the legal term used to identify the situation in which government becomes so involved in the affairs of a private entity that the private entity's actions are, in effect, those of the government and are therefore government policy.

Sections 1981 and 1985 of Title 42, U.S.C., have not been used widely by faculty members but they might conceivably be applied in cases involving faculty employment issues. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same

[1] 42 U.S.C. §1981 does not apply to cases of sex discrimination. *League of Academic Women v. Regents of University of California*, 343 F. Supp. 636 (N.D. Cal 1972); *Held v. Missouri* Pac. R. Co., 373 F. Supp. 999 (S.D. Tex. 1974).

> right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment . . . penalties . . . and exactions of every kind, and to no other.

It has been held, for example, that §1981 provides a remedy for discriminatory labor practices (*Belt v. Johnson Motor Lines, Inc.*, 458 F. 443 (5th Cir. 1972)).

To bring an action under §1985, a faculty member must establish a "conspiracy." This section states:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws; the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators.

Courts have held that to use the "conspiracy" charge, the plaintiff must allege facts showing that the defendents conspired together to deprive him of rights, privileges, and immunities secured by the Constitution and the laws of the United States (*Colon v. Grieco*, 226 F. Supp. 414. (D. N.J. 1964)).

Equal Pay Act

Under the Equal Pay Act of 1963, itself an amendment to the Fair Labor Standards Act of 1938, sex discrimination in wages for workers performing essentially the same jobs is prohibited. The Education Amendments of 1972 (§906(b)(1)) extended the Equal Pay Act to previously-exempted salaried employees, including executives, administrators, and professionals. As amended, the Fair Labor Standards Act of 1938 (29 U.S.C. §201-19) provides:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of an employee (6(d)(1)).

The Act is administrated by the Wage and Hour Division of the Department of Labor, and the procedure for redress is simple. An aggrieved individual contacts the nearest Wage and Hour Division office by telephone or mail to file a complaint. Informal conciliation procedures are followed to resolve the complaint, but if these are unsuccessful, the case can be taken to court (Fair Labor Standard Act of 1938, §16 and 17). Penalties for violation of the Act include payment of back wages, or other financial settlements, injunctions, and criminal sentences for deliberate violations (Steinbach and Reback 1974).

Although limited to the question of salaries, the Equal Pay Act is a powerful weapon to combat sex discrimination in employment, because the Wage and Hour Division had been effective in administering the law. Morag Simchak, when she was the top-ranking woman in the Department of Labor, noted:

> The Equal Pay Act has the advantage of the strong administrative and enforcement procedures of the Fair Labor Standards Act and an enforcement staff of approximately 1,000 compliance officers. . . . Another reason for its effectiveness is that the Department is authorized by law to make routine, general investigations of establishments to ensure compliance, regardless of whether a specific complaint is received or not (Cited in Feld 1973, p. [illegible]).

The Department of Labor's interpretation of the Equal Pay Act ("Equal Pay for Equal Work" 1971) points out that jobs need not be absolutely equal before wage differentials between sexes can be scrutinized:

> Jobs that require equal skill, effort, and responsibility in their performance within the meaning of the Act are not usually identical in every respect. . . . Congress did not intend that inconsequential differences in job content would be a valid excuse for payment of a lower wage to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment ("Equal Pay for Equal Work" 1971, §800.120).

This interpretation of the Equal Pay Act explains which jobs are covered under the Act's criteria of (1) equal skill, (2) equal effort, (3) equal responsibility, and (4) similar working conditions. The first criterion, "equal skill," requires an examination of factors such as "experience, training, education, and ability" (§800.125), but the extent to which a skill is actually used in job performance cannot be a factor in determining a wage differential, nor can a skill that is unnecessary to a particular job be a factor in salary determination. The

second criterion appears most applicable to manual work (Steinbach and Reback 1974) and requires the measurement of "physical or mental exertion needed for the performance of a job" (§800.127). Under the third criterion of equal responsibility, the government looks to "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation" (§800.129). This means that employees of different sexes performing the same jobs may receive different salaries if one of them has an additional substantive responsibility. Finally, the question of "similar working conditions" involves "a practical judgment . . . in the light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels" (§800.131).

Currently, these guidelines do not distinguish between professional and other employees, since they were issued in 1971, before the exemption for professional employees was revoked in the Education Amendments of 1972. Therefore, they are based on the assumption that each job has a fixed salary, and the person performing the job is paid what the position is worth (Steinbach and Reback 1974). There is no indication yet that new guidelines will be issued with specific criteria for professional employees.[5] However, there are exceptions to the application of these criteria when a merit system is involved. The guidelines note that merit system plans may be formal, or written, or they may be informal and unwritten; however, the employer must be able to establish that

> the standards or criteria applied under [the plan] are applied pursuant to an established plan the essential terms and conditions of which have been communicated to the affected employees (§800.144).

Title IX, Education Amendments of 1972

Most recent of the federal laws available to aggrieved faculty, Title IX is concerned with insuring nondiscrimination on the basis of sex for students and faculty in higher education institutions that receive federal assistance. Specifically §901 (a) provides:

[5] The Wage and Hour Division, Department of Labor, issued regulations in 1973 that define the employment categories of executive, administrative, and professional employees, and outside salesmen that are covered under the Equal Pay Act as amended in 1972, but no new guidelines were included. ("Fair Labor Standards Act, Extension of Equal Pay Provisions to Formerly Exempted Employees," *Federal Register* 38 (May 7, 1973):11390-11412).

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal assistance . . . .

The Department of Health, Education, and Welfare (Office for Civil Rights) is responsible for administrating this law and issued regulations in spring 1975, effective July 1, 1975 ("Complete Text . . ." 1975). With certain limited exceptions, all educational institutions that receive some form of federal assistance are subject to these regulations, and are required to provide an "assurance" of compliance with them to the director of the Office for Civil Rights. OCR may conduct compliance reviews to obtain information "to fulfill the duties of the Director under Title IX requirements" (§86.71), periodically, or upon a written complaint of discrimination. A finding of noncompliance would result in suspension, termination, or a refusal to award federal assistance, after certain procedures had been followed. Unlike a similar provision under Executive Order 11246, as amended, however, which cuts off aid to the entire institution, this withdrawal of federal aid would be limited to

> the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found or which has been infected by discrimination in another part of the education program or activity operated by the recipient (§86.73 (a)).

In another departure from the Executive Order Guidelines, Title IX guidelines require the institution to establish a grievance procedure to process complaints of Title IX violations. The Office for Civil Rights "may defer action" on complaints filed with it until the grievance procedures have been used (86.8 (b)). Women's groups fear that this process for hearing of grievances may delay action on complaints indefinitely because no time limit for the establishment of the required grievance procedure is included in the guidelines (Fields 1975). In other respects, the Title IX guidelines in the area of employment practices are similar to the requirements for nondiscriminatory practices under the Executive Order, and will not change institutional personnel policies for most colleges and universities.

Summary

In the last 15 years, the federal government has gained considerable experience in monitoring and remedying discriminatory employment

practices under the authority of Title VII, Civil Rights Act of 1964, Executive Order 11246, as amended, and the Equal Pay Act of 1963. Post-Civil War civil rights laws have also been used to combat discriminatory employment practices. Title IX, a new addition to this group, is directed toward sex discrimination in educational institutions. These laws seek to promote true equal employment opportunity. Except for the Equal Pay Act, they affect all aspects of employment: recruitment, hiring, promotion, conditions of employment, and fringe benefits. In addition to becoming familiar with the provisions of the laws and the implementing regulations, college faculty and administrators need to learn how their past application in the industrial sector may be translated to the area of professional employment, particularly in higher education institutions.

Applying the Laws to Faculty Employment

Federal agencies and courts have developed standard approaches to evaluating employment policies and practices for possible discrimination. Covering all aspects of employment, these approaches evolved from court rulings, and are implemented by regulations that follow the court decisions. The numerous federal regulations for employment practices are necessitated by the nature of employment discrimination:

> . . . discrimination in employment is a complex, subtle and frequently difficult to isolate phenomenon. As a general proposition, employment discrimination is not the result of a deliberate, malicious act on the part of one individual against another. Rather, it is usually found as an inbred practice in an employment situation which, on its face, does not single out any specific individual but tends to work its discriminatory effect in very subtle and frequently imperceptible ways (Sape 1974, p. EEO-7).

The significance of the approaches developed to deal with this problem and their potential impact on faculty employment need to be examined in the context of the guiding court decisions and the implementing regulations.

Recruitment and Hiring Requirements

Equitable recruiting and hiring procedures are considered crucial in promoting equal employment opportunity. At this initial stage of the job cycle, barriers to employment opportunity can set the pattern for later discrimination. Employment qualification requirements are important because they facilitate or inhibit the hiring of certain groups. Until Title VII was extended to include professional employees, possible discrimination in qualifications for faculty applicants and employees had not been a major issue, but now Title VII rulings in this area raise the possibility that traditional faculty qualifications may be subjected to court scrutiny.

The leading court decision in this area is *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), which deals with the relationship between job criteria and discrimination and considers methods for judging the appropriateness of job criteria. *Griggs* was the first case to present the Supreme Court with the question of whether Title

VII[6] prohibited an employer from instituting as a condition of employment either a high school education or the passing of a standardized intelligence test when:

> (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites (401 U.S. at 426).

The Court looked at the effect the education test requirement had on the hiring into and transfer of Negroes to any department other than unskilled labor. The Court found that since the high school education and testing requirements could be met much more easily by whites than by Negroes, most Negroes would be confined to jobs in the labor department. The requirement would therefore continue the wrongful exclusion of Negroes from job opportunities in the company. The Court held that the disproportionate exclusion of Negroes from job opportunities in the company as a result of the education/test requirement violated Title VII because:

> Under this Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices (401 U.S. at 430).

The Court further commented:

> . . . good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capacity (401 U.S. at 432).

With respect to the relationship between employment requirements and job performance, the Court held that only requirements demon-

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[6] The provisions of Title VII under consideration in this decision were the following portions of section 703:

(a) It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or natural origin.

• • •

(h) Notwithstanding any provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

strably related to job performance are permitted under Title VII: "The touchstone is business necessity" (401 U.S. at 431). In *Griggs*, the Court noted that employees hired before the newly instituted requirements who could not meet them nevertheless performed their jobs satisfactorily. In fact, the requirements "were adopted . . . without meaningful study of their relationship to job-performance ability" (401 U.S. at 431).

The *Griggs* decision emphasizes the importance of establishing job requirements that are nondiscriminatory in *effect* as well as intent. To this end, in 1971 the Equal Employment Opportunity Commission promulgated "Guidelines on Employment Section Procedures" (299 C.F.R. Part 1607) to provide employers with guidelines for nondiscriminatory employment selection procedures. These guidelines were issued before professional employers were governed by Title VII, and are mainly directed to quantifiable employment requirements, but consideration is also given to unscored job selection techniques that are most often employed in faculty selection, such as interviews and application forms. Courts have upheld the guidelines in general as expressing Congressional intent, but they have not ruled specifically on the use of subjective procedures. The guidelines state that the burden is on the employer to demonstrate the validity of such relatively subjective procedures when there are indications of job discrimination, such as "differential rates of application rejection from various minority and nonminority or sex groups for the same job or group of jobs" (§1607.13). Otherwise, the employer must adjust selection procedures so as to eliminate the conditions suggesting job discrimination.

To many observers, the 1971 EEOC guidelines require adaptation in order to be applied meaningfully to selection procedures for professional employees, including faculty members. Bartnoff (1973) suggests that while employment principles emerging out of industrial labor cases will also apply to jobs where intellectual and verbal skills are most important, greater flexibility will be necessary because:

> . . . upper level employment decisions are likely to turn on subjective, discretionary assessments of intangible qualities like "judgment," "leadership," "initiative," and "sensitivity." In contrast, standards for hiring and promotion in lower level jobs often can be objectified and the requisite job skills articulated and measured (Bartnoff 1973, p. 1615).

To date, this distinction has not been established in the federal employment selection guidelines. Following the amendments to Title VII in 1973, the Equal Employment Opportunity Coordinating Coun-

cil (a conglomerate of several federal agencies charged with coordinating their efforts to combat employment discrimination) issued draft guidelines (never published) on employment selection procedures that were similar to the 1971 guidelines. This similarity evoked concern from higher education administrators who believe that the EEOC should recognize the unique nature of the faculty employment process. For example, an Equal Opportunity Task Force under the aegis of the American Council on Education noted:

> Testing on the scale required by the validation provisions of the [EEOC] Guidelines assumes that large numbers of faculty members do the same jobs, that all members of an academic department must have the same qualifications and need have none that is different, and that all persons of the same faculty rank are functionally identical. In fact, the department that is labeled with the name of an academic discipline is characterized by a great many functions . . . [requiring] in its individual members differing (not the same) knowledge, skills, and experience (Commentary . . ."1973, p. 1).

In view of the fact that faculty qualifications are not readily measured by demonstrably objective tests, the Task Force suggests that the "job-relatedness" approach of *Griggs* be substituted for quantitative measurements, and that colleges and universities develop: (1) detailed descriptions of their goals in relation to their clienteles and the extent of their need to increase the representation of women and minorities; and (2) "a careful verbal description of each subfunction and the qualifications necessary to carry it out" ("Commentary . . ." 1973, p. 3).

The *Griggs* decision and federal employee selection guidelines may also affect the use of the doctorate as a traditional requirement for initial employment or promotion in colleges and universities. At present, courts have accepted the right of institutions to require a Ph. D.,[7] but have not yet examined the possible adverse affect on the employment of women and minorities (LaNoue 1974c) in light of the fact that Ph.D.'s are held by a disproportionately larger number of white males than women and minorities. As one writer observes:

> . . . the national pattern in awarding Ph.D.'s suggests that a Ph.D. requirement in hiring probably has an adverse effect on potential women and minority faculty in any higher education institution. The pattern of degree awards coupled with the dearth of women and minorities in

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[7] *DiCarli v. Hayakwa*, No. C-71-1319 LHB, U.S. District Court for the Northern District of California, 1974; *Slippery Rock State College v. Pennsylvania Human Relations Commission*, 314 A. 2d 344, 7 FEP 432 (Pa. Commonwealth Court 1974).

> senior faculty positions may be enough to shift the burden of proof to the employer. (LaNoue 1974c, p. 7).

If an adverse effect is found, then questions will be raised about the "business necessity" of educational credentials in faculty employment, e.g., (1) the use of degree requirements to define an availability pool; (2) the use of the degree in preferring one candidate over another; and (3) "if degrees are ever a valid consideration . . ., which degrees at which institutions meet the business necessity test?" (LaNoue 1974c, p. 7).)

If the court decisions were to bar the use of the Ph.D. or any other degree as a college employment requirement, the impact on affirmative action efforts would be enormous. At the present time, to meet the requirements of Executive Order 11246 guidelines (Revised Order No. 4), colleges establish goals and timetables for their faculty employment units based on the national figures for recent Ph.D.'s or other appropriate degrees. The importance of the Ph.D. criterion in this procedure is apparent from the following advice on how to formulate goals:

> Once the list of source institutions [top-ranked, doctorate granting institutions, departments, and usual recruitment sources] is compiled, staff members should enter . . . the numbers of men and women who have received a terminal degree in recent years, by institution. These figures should be totaled by sex for each year and for the several-year period, and the resulting number of women should be shown both numerically and as a percentage of the total. . . . This percentage then represents the percentage of women available (Hanson and Pondrom 1974, p. AFA-17).

In the event that colleges are compelled to forego this approach to determining their recruitment pool, and to substitute a program of "objective" testing as suggested by the current employee selection guidelines, the financial cost to the institutions would be high. The EEO Task Force estimates that about 500,000 faculty and professional staff positions would be involved in such an undertaking, at a cost of more than $1 billion ("Commentary . . .," 1973, p. 5).

Affirmative Action in Recruitment and Hiring

Despite nearly five years experience with Executive Order 11246, its impact on faculty employment continues to be debated. Concern focuses particularly on the hiring process, where decisions with long-range implications for an institution's employment profile and quality are made. A recent memorandum from the director of the Office for

Civil Rights, Peter E. Holmes, to college and university presidents reaffirms an institution's right to control its employment practices:

> Colleges and universities are entitled to select the most qualified candidate, without regard to race, sex, or ethnicity for any position. The college or university, not the Federal Government, is to say what constitutes qualification for any particular position. No single appointment will be objected to where those not appointed are less well-qualified than the candidate actually selected ("Memorandum to College. . .," 1974, p. 2).

The memorandum also addresses itself to reports published or circulated in the higher education community about white male applicants who were refused employment and were told that, although they were eminently qualified, a woman or minority member had to be hired to meet affirmative action employment goals. Holmes states that an employer who holds open any position only for specific groups of applicants in order to fulfill an affirmative action goal violates its equal employment opportunity obligations. The OCR memorandum points out that Executive Order 11246 requires not *preference* for specific classes of applicants, but fair consideration of all candidates.[8]

Critics' fears that poorly qualified women are and will be chosen over better prepared male candidates are belied by statistical evidence that shows these groups continue to be hired at a disproportionately lower rate than their white male counterparts:

> The National Academy of Sciences reports that the unemployment of women with doctorates in science, engineering, and social sciences is more than four times as high as the unemployment rate of their male colleagues: 3.9 percent compared to .9 percent. A study at the University of Michigan of recent doctoral recipents showed that women doctorates were unemployed or underemployed at three times the rate of their male counterparts. In the biological and medical sciences, about 50 percent of the men who were in teaching institutions were in schools regarded as comparable to the University of Michigan; for the women, only 16 percent were comparably placed (Sandler 1975, p. 463). [The statistics are the best available. There are no statistics that give the complete picture of the hiring and level of employment of faculty women.]

8 Some critics of affirmative action requirements apparently regarded this memorandum as a retreat from HEW's enforcement of Executive Order 11246, but Holmes responded that the memorandum's purpose "was to clarify long-standing legal and policy principles . . . in order to correct misconceptions and deter abuses." ("Office for Civil Rights," 1975; see letter to Peter Holmes, Director, Office for Civil Rights, from Roger W. Heyns, President, American Council on Education, February 13, 1975.)

Colleges and universities affected by the Executive Order may be deemed in compliance if they have met their goals, or if they can demonstrate that they have made "good faith" efforts to recruit and hire women and minorities. Typically, good faith efforts require college personnel to recruit applicants from a wide range of possible sources, particularly those that may have contact with women and minority applicants, and to select the most qualified candidate from a representative group of applicants (Shulman 1972, pp. 21-26). The entire hiring process must be documented. This extensive effort to hire faculty contrasts sharply with the informal procedure generally in widespread use at the time the Executive Order was applied to higher education. The common approach to employment was the "old boy" method by which the faculty members concerned requested recommendations for new employees from their colleagues. This informal procedure appears to have resulted in an "underutilization" of women and minorities (Wheeler 1972, p. 266).

Reappointments, Promotion, and Tenure

Federal involvement in the area of faculty reappointment, promotion, and tenure is likely to match in importance the federal concern with the problem of faculty recruitment and hiring, because the present tight faculty job market will result in a greater number of court-contested decisions on reappointment and promotion. There are already some decisions that imply the crucial issue will be whether objective standards of performance have been applied in an equitable context.

College teachers frequently file complaints about employment decisions under Title VII of the Civil Rights Act of 1964 because it provides them with an opportunity for favorable consideration by the courts:

> Title VII is basically a civil rights law, and as such is uniquely slanted to favor the complaining party. In order to get a case before the court, a charging party, or the government, need only establish a *prima facie* case . . . it is [then] incumbent upon the respondent . . . to show why the particular policies in question either do not discriminate or are directly job-related, required by reasonable business necessity (Sape 1974, p. EEO-25).

Several recent cases involving the nonrenewal of teaching appointments or the denial of tenure indicate that the type of evidence teachers may produce to establish a *prima facie* case can be of a statistical nature, showing a significant disparity in the treatment of the pro-

tected group, or it may meet guidelines set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) that apply to all groups protected by Title VII:

> . . . a *prima facie* case . . . may be [established by a plaintiff's] showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications (411 U.S. at 802).

In *Johnson v. University of Pittsburgh*, 359 F Supp. 1002 (W.D. Pa. 1973), the court granted a preliminary injunction ordering a university to retain a female biochemistry teacher in her job until her sex bias claim could be resolved at a full trial (no trial date has yet been set). The preliminary injunction was granted because the court concluded that the teacher had established a *prima facie* case of discrimination that demonstrated a "reasonable likelihood of success on the merits" and that on balance maintaining the status quo would prevent irreparable hardship to Johnson, while the university would not be so injured (359 F. Supp. at 1010). The teacher, Sharon Johnson, had charged that the University of Pittsburgh School of Medicine denied tenure to her on the basis of her sex rather than on the basis of failing to meet the school's criteria for a tenure appointment. The court held that the statistical evidence produced by Dr. Johnson established a *prima facie* case that required the university to submit evidence rebutting Dr. Johnson's claim of sex discrimination (359 F. Supp. at 1008):

> The evidence offered in this case shows that out of 401 faculty members in the School of Medicine, only 5 women have tenure. Six Departments in the School of Medicine have no women at all, eleven have no tenured women and only three have women with tenure. . . . . There are four times as many women eligible for tenure on this faculty as there are men. During the last six years, 70 men were given tenure as compared to 5 women (359 F. Supp. at 1008).)

In the court's view other factors in the case constituting *prima facie* evidence of discrimination were: (1) the denial of tenure to Dr. Johnson while a similarly situated male was granted tenure; (2) larger salary increases awarded to the men in her department than to Dr Johnson, the only woman in the department during a five-year period; (3) her department's adoption of new termination procedures used for the first time in Dr. Johnson's case; (4) no evidence of efforts to eliminate sex discrimination in Dr. Johnson's department and

the School of Medicine under the university's affirmative action plan; and (5) decreases in the number of women faculty members in the School of Medicine while sex discrimination complaints were pending.

In a similar case, however, another federal district court denied a preliminary injunction to a female research scientist who sought to prevent her dismissal from New York University and any alteration in her status as a fulltime assistant professor (*Faro v. New York University*, No. 73 Civ. 3769, U.S. District Court, Southern District of New York, Nov. 9, 1973, 6 E.P.D. ¶8940, aff'd 502 F.2d 1229 (2nd Cir. 1974). Maria Diaz Faro came to New York University (NYU) in 1965 as part of a special research project team, and later became involved with teaching projects in NYU's medical school. In 1971, eleven faculty members including Faro had their academic appointments terminated, but were offered new appointments without any promise of tenure. Only Faro rejected this offer. Instead, she proposed that she be given an appointment in the Department of Cell Biology that would meet certain conditions specified by her, including tenure. Her conditions were not accepted, and NYU instead hired male professors to teach the gross anatomy course formerly taught by her, but they were not appointed on the tenure track. At the same time, Faro continued in other employment at the medical school and was offered other positions, which she did not accept. Her employment at the university was terminated in December 1973. In her suit, Faro claimed that she met the *McDonnell-Douglas* criteria for showing a *prima facie* case of discrimination, but the court concluded:

> . . . there is a fatal defect in the plaintiff's case. The plaintiff's application for a job in the Department of Cell Biology . . . was so circumscribed by conditions set down by the plaintiff that no such job was available for her or for any other person, male or female (6 E.P.D. ¶8940; p. 6011).

Further, the court found that NYU's financial problems required the person who was to teach the gross anatomy course to be nontenured, but that Faro would accept only a tenured position. The court concluded that sex discrimination was not evident from the hiring of the male teachers within the cell biology department because their appointments included research within the department, while Faro's research would be outside the department. Statistically, the court found that the medical school's record for employing women was satisfactory; over 9 percent of the medical school's faculty were women, while nationally only 7.1 percent of all medical doctors are women.

and 3 of the 21 tenured members of Faro's department were women (Ibid.).

Other court decisions deal with the problem of whether the academic criteria used to make faculty employment decisions are discriminatory. Generally, courts have been reluctant to substitute their own evaluation of academic qualifications for the decisions reached by universities. *Green v. Board of Regents of Texas Tech University* is the most frequently cited faculty employment discrimination case that has reached a federal court of appeals. In this case, the plaintiff brought suit under 42 U.S.C. §1983 charging that she was denied a promotion to full professor because of sex discrimination. The courts, however, found for the university because traditional procedures for promotion had been applied equitably, and the academic evidence presented against Green indicated that the university's decision was not based on sex discrimination:

> The findings and decision of academic administrative bodies are to be upheld by the courts when reached by correct procedures and supported by substantial evidence. . . . The University's standards are matters of professional judgment, and here substantially every individual or committee in the institution's review body questioned Dr. Green's competence (474 F.2d at 596).

Green was later cited in a nonreappointment case, *DiCarli v. Hayakawa* (no c-71-1319 L.H.B. U.S. District Court for the Northern District of California, January 8, 1974), where the court upheld a decision of the California State University at San Francisco not to reappoint a female instructor in Spanish. The university's decision not to reappoint was based on the plaintiff's lack of Ph.D., a recent department requirement to insure that all members could be capable of teaching the full range of course offerings, and on the fact that legislative action would result in a reduced demand for teacher-training programs, the plaintiff's specialty. The court did not agree with plaintiff's contention that these reasons were a pretext to cover sex discrimination, but held that the decision not to reappoint was fairly based on departmental needs and requirements (slip op., p. 10). Citing *Green v. Texas Tech*, the DiCarli court stated:

> It is undisputed that such an evaluation is necessarily judgmental and the court will not substitute its judgment for the rational and well considered judgment of those possessing expertise in the field (slip op., p. 6).

A 1973 EEOC decision concurred with the view that academic employment criteria are unique, but still found reasonable cause to

believe that a decision not to reappoint and grant tenure to a female music instructor had been the result of discrimination ("Failure to Reappoint . . .," 1973). The EEOC used the *McDonnell-Douglas* criteria in this case because it found that faculty employment decisions present some unconventional problems:

> We recognize that . . . a certain measure of subjectivity is inevitable in reaching the decision of whether to retain a faculty member and grant him or her tenure. The *situation is made much more difficult by the fact that in making or reviewing such a decision one is not dealing with the relative qualifications of competing individuals, but rather with the qualifications of a person relative to some nebulous norm* [emphasis added] ("Failure to Reappoint . . .," 1973, p. 4052).

By the *McDonnell-Douglas* standards, however, the music teacher was able to establish a *prima facie* case of sex discrimination with the evidence that she was qualified for the position she sought. Consequently, the respondent university had the burden of proving that it did not discriminate, and the EEOC stated that its rebuttal evidence must meet criteria articulated in *McDonnell-Douglas*:

> . . . While Title VII does not, without more, compel rehiring of . . . [complainant], neither does it permit [the company] to use [complainant's] conduct *as a pretext for* the sort of discrimination prohibited by §703(a)(1) (Emphasis in original, p. 4054).

Reviewing the testimony, the EEOC concluded that while "personality conflicts" (p. 4055) were in fact the reason for the music department's negative decision, this problem did not outweigh the teacher's contributions to the department. Further, the EEOC found that the subjective nature of the academic decisionmaking process on appointments and promotion could serve as a vehicle for discrimination, observing that the view espoused in *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972), is equally applicable when women are evaluated by men. *Rowe* had stated:

> . . . we . . . recognize that promotion . . . procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks, much of which can be covertly concealed and, for that matter not really known to management (457 F.2d at 359).

If *Rowe* is generally applied to academic employment practices, many colleges and universities could face serious problems because they use an "awarded tenure system" (LaNoue 1974a; Sape 1974), which requires a college teacher to "demonstrate with varying de-

grees of conclusiveness a distinguished performance before the award [for tenure] is made" (LaNoue 1974a, p. 207). A department awarding tenure uses subjective institutional criteria in reaching its decision, and these criteria may be based on such disparate factors as market conditions for faculty employment, upgrading the standards of the institutions, or a change in institutional priorities (LaNoue 1974b). To date, however, the courts have allowed subjective criteria to be used in faculty promotion decisions. In *Faro*, for example, the Court of Appeals commented:

> Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally. . . . This argument might well lend itself to a *reductio ad absurdum* rebuttal" (502 F.2d at 1232).

Financial Exigency

Public and private higher education still face the financial problems that were first recognized and documented during the latter part of the 1960's. For many institutions, continuing financial difficulties mean hard decisions on faculty employment, particularly in the granting of tenure, which involves a substantial outlay of institutional funds over a long period of time (Furniss 1973, p. 10). To save money on faculty salaries, an administration may impose tenure quotas or stiffer requirements for the award of tenure. Further, a faculty member who is denied tenure customarily cannot continue employment in the same university system. Negative tenure actions are most likely to affect women and minorities adversely because they are generally concentrated in the lower, nontenured faculty ranks, and consequently they will face greater barriers to achieving permanent employment than did their male predecessors in more expansive times. Affected women and minority faculty might attempt to challenge the financial considerations underlying an institution's tenure policy by using Title VII or affirmative action requirements. Their challenges would be analogous to those of laid-off minority workers contesting the validity of industrial seniority systems—"last hired, first fired"— that result in the decreased employment of minority workers.

In two cases, *Watkins v. United States Steel Workers*, 369 F. Supp. 1221 (E.D.La. 1974) and *Jersey Central Power and Light Company v. Electrical Workers, Local 327* (D. of New Jersey, No. 74-1083, September 5, 1974), the courts ordered two-track seniority systems to

maintain equitable racial representation in the work force during a period of layoffs. In *Watkins*, both currently employed and discharged black workers challenged their employer's and union's layoff and recall practices as being racially discriminatory under Title VII and 42 U.S.C. §1981. Their employer, the Continental Can Company, did not hire blacks until the latter part of the 1960's and then in 1971 began substantial layoffs of employees. Under the company's collective bargaining agreement, those with the least total employment seniority were laid off first and placed on a recall list. Laid-off employees are recalled in order of seniority, and consequently there was a substantial decrease in the total number of black employees. Although §703(h) of Title VII protects *bona fide* seniority systems from regulations, the courts held that the seniority system in Watkins was not *bona fide* because the company's past discriminatory policy has prevented blacks from accumulating the required seniority. The court agreed to allow the parties in the dispute to work out a remedy, but indicated its approval of one proposal that

> . . . [would apportion] the layoffs among whites and blacks on the basis of the proportion of each group to the total workforce. Then the employees to be laid off could be selected within each racial group on the basis of plant seniority 369 F. Supp. at 1232).

In the Jersey Central case, when the company had to reduce its work force because of economic conditions, it faced a conflict between meeting the affirmative action goals required under its EEOC conciliation agreement and satisfying the seniority clause in its union contract. The company asked the court to decide which agreement it should honor. The court's solution recognized that the affirmative goals could not be reached under the current business conditions and therefore its solution was designed to maintain the gains already won. The court accordingly ordered that the layoffs be divided between minority and nonminority workers, so that after the layoffs were completed, ". . . minorities would be represented on the same percentage basis as they held when the layoffs commenced" ("Preserving Bias Remedies . . .," 1974).

A federal court of appeals decision subsequent to *Watkins* took a different view of an employment seniority system that originated during a period when the employer practiced racial discrimination. In *Waters v. Wisconsin Steel Works of International Harvester*, 502 F.2d 1309 (7th Cir. 1974), the court held that the "last hired, first fired" seniority system in force was not itself racially discriminatory nor did it help to continue past discriminatory practices, although

layoffs would in fact reduce the number of minority workers employed by the company. The court stated:

> To hold otherwise, would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory purposes (502 F.2d at 1320).

To date, similar Title VII challenges to faculty discharges because of financial difficulties have not occurred, and it would be difficult to predict the result of such cases. One commentary points out the potential problems:

> . . . affirmative action programs which confer special opportunities for employment to individuals who were not themselves victims of discrimination may be challenged by those who were not themselves parties to discrimination. [These cases] point out potential conflict between affirmative action rules and collective bargaining agreements which provide for layoffs on the basis of seniority. It may not be a defense to college and universities that qualified candidates for faculty appointment had not been available until recently, since the unlawfulness of a practice is determined by its consequences, rather than the motivation behind it. However, the fact that the institution had not consciously discriminated may inure to its benefit (Steinbach and Reback 1974, p. 39).

Tenured faculty have, however, challenged their layoffs due to financial exigency under 42 U.S.C. 1983 in *Johnson v. The Board of Regents of the University of Wisconsin* (377 F. Supp. 227, W.D. Wis. June 13, 1974[9]). These teachers, all members of departments in which there were no nontenured faculty, were separated from their positions because of a series of decisions beginning with a determination by state officials that there would not be enough funds available to pay teachers' salaries due to two major financial problems: (1) the 1973-75 budget approved by the state legislature required a 5 percent reduction in the Wisconsin system over the two-year period; and (2) declining enrollments mandated, by state law, an additional reduction in funds to those campuses affected. Final decisions on which faculty members were to be terminated were made by the chancellors of each campus, who were responsible for effecting the reduction in funds required by the central university administration. A review process was afforded to the faculty members who protested their chancellor's decision, but despite faculty recommendations that in

[9] A similar case, *Levitt v. Board of Trustees of the Nebraska State Colleges* (D. Nebraska No. 73-L-261, June 13, 1974) also found for the defendents. *Johnson* was affirmed by the Seventh Circuit Court of Appeals in an oral order, January 17, 1975.

some cases reversed the termination decisions, all the chancellors upheld their original decisions. The teachers requested a preliminary injunction so they could continue in their present employment unless and until they received minimal due process before their terminations. The court determined, however, that the laid-off teachers were only entitled to procedural protections after they had been notified of termination, and that their case against the university's decisions would have to prove that they were singled out for termination because of constitutionally impermissible reasons or because the decision for their terminations were completely arbitrary and unreasonable (377 F. Supp. at 239).

The court concluded that the minimal protections that had to be granted terminated teachers included the following procedures, which had been met by the university:

> . . . furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay off;
> furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
> making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and
> providing each plaintiff the opportunity to respond (377 F. Supp. at 240).

The *Johnson* court's outline of the procedures that must be made available to tenured faculty members being discharged is less stringent than that recommended by the American Association of University Professors (AAUP) in its statement on "Termination of Faculty Appointments Because of Financial Exigency, Discontinuance of a Program or Department, or Medical Reasons," which was published for comment in the winter of 1974.[10] In the section that outlines procedures for termination due to financial exigency, the AAUP requires the participation of the faculty in all aspects of the decision-making process, from the determination that financial exigency exists to the decision on who shall be terminated. A faculty member notified of termination has the right to a full hearing before a faculty committee, and the hearing may include the following issues:

> (i) The existence and extent of the condition of financial exigency. *The*

[10] This statement is a formulation of Revised Regulation 4, Recommended Institutional Regulations on Academic Freedom and Tenure. For a discussion of faculty personnel practices in times of financial exigency see Furniss, "Retrenchment, Layoff, and Termination," *Educational Record* 55 (Summer 1974): 159-170.

> *burden will rest on the administration to prove the existence and extent of the condition . . . .*
> (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered *prima facie* valid.
> (iii) Whether the criteria are being properly applied in the individual case ("Termination . . ." 1974, p. 412) [emphasis added].

There have also been suggestions that the higher education community should develop its own arbitration system to work out conflicts between faculty and university administration (Lester 1974; LaNoue 1974b.) Lester, for example, contends that an arbitration system would be more satisfactory to all parties than costly and prolonged court and regulatory agency proceedings. His system would involve:

> . . . either . . . a national panel of 100 to 200 faculty mediator-arbitrators . . . with selected universities and colleges around the country participating, or . . . a regional-unit . . . with regional panels of faculty, mediator-arbitrators and with participation by selected universities and colleges in the regional area (Lester 1974, p. 97).

Lester anticipates that procedures to resolve a faculty-administration dispute would be conducted in a "calm, objective manner" and that lawyers would be unnecessary in many cases (p. 99). The decision would be binding unless the parties stipulated otherwise, or a court ruling affected the decision in some manner. Lester states that his proposal has generally met with favorable reaction in the higher education community, but one observer comments:

> Such, a procedure would have disastrous effects on the rights of women and minorities, for typically arbitration is not concerned with the principles of redress of grievances or inequities, but with working out a compromise position between two adversaries . . . arbitrators are *not* required to follow federal standards or court-derived principles in working out solutions (Sandler 1975, p. 414).

Other Conditions of Employment: Equal Pay and Fringe Benefits

The problem of providing equity in salaries and fringe benefits is complicated for colleges and universities by a lack of consensus among government agencies and interested observers over what is required and how it is to be achieved. At stake in the resolution of these problems is the financial costs involved for the institutions in bringing the salaries and fringe benefits for women up to the level of similarly situated men, and the extent to which universities will have to add or alter administrative procedures to comply with agency guidelines.

Equal Pay

There is little published discussion on applying the sex discrimination ban of the Equal Pay Act to college faculty, and the ultimate impact of the Act on faculty employment practices. The overriding concern of those involved with this issue, however, appears to be that the current guidelines, which were developed for nonprofessional workers, are wholly inappropriate for faculty employees hired for their individual skills, and that the guidelines cannot be incorporated into most faculty employment systems. Generally, colleges and universities do not use salary schedules,[11] but to satisfy the requirements of the Equal Pay Act they will probably have to institute a rational, systematic program for setting faculty salaries that includes, among other things: the criteria to be used in determining full-time and part-time status; a solution to the problem of having to pay varying faculty salaries because of supply and demand factors; a standard method for the use of peer judgments in wage/salary administration; a system for equating degrees and academic experience; and a system for evaluating wage/salary differentials based on such factors as rank, publication research, public service, or prestige of past educational experience (Frohnmayer 1973).

Difficulty in developing such a system may move colleges and universities toward a salary schedule approach, with broad ramifications for faculty personnel administration:

> . . . the entire system of faculty remuneration will move toward the "ranges and steps" plan, wherein it is much more difficult to give priority to certain disciplines and to certain subdisciplines through the mechanism of ad hoc salaries needed to attract or retain particular faculty. . . . The regulations would, in the long run, tie "jobs" to objective criteria. . . . The focusing on the job instead of the person would tend in practice to lead to minimal "skill," "effort," "responsibility" as the basic employment standard (Steinbach 1973, p. 7).

The difficulties inherent in adapting current faculty salary practices to a salary schedule approach are suggested in a 1974 lawsuit filed by the Department of Labor against Boston State College for failing to supply it with the information on faculty salaries that it had requested (Brennan v. Morrissey, Civil Action No. 74-2311-G

[11] A National Education Association survey, "Salaries Paid and Salary-Related Practices. . ."(1972), of 1,114 institutions found that less than half of those surveyed maintain a salary schedule. A salary schedule was described as "a statement that designates minimum and maximum salaries for each rank and that generally designates also the number and amounts of salary increments for faculty members of each rank" (p. 30).

Court, still pending). Boston State College's reply to the suit in part[12] alleges that the Department of Labor placed the college at a "critical disadvantage" in its ability to avoid violating the Act because the only available regulations apply to industrial employment situations and this deprives the college of its "due process right to have advance knowledge of which general actions or policies are violative of federal law" (Boston State College 1975a, p. 8). Boston State College also contends that the Labor Department's requests for information

> . . . are interfering with the Defendants' efforts to exercise their legitimate professional personnel hiring, promotion and curriculum planning functions. . . . As a result of the educational uncertainties resulting from the Plaintiff's actions, academic and administrative planning and implementation within Defendant Boston State College for the 1974-1975 and the 1975-1976 academic years have been curtailed and its administrative costs have been increased pending the outcome of the instant case. In addition, the Plaintiff's actions have severely damaged the Defendants' professional reputation (Boston State College 1975a, pp. 8-9).

Retirement Plans

Federal regulation of college and university retirement plans is the responsibility of both the EEOC and the Department of Labor's Office of Federal Contract Compliance (OFCC), both of which have issued separate and conflicting guidelines defining what constitutes nondiscrimination in retirement benefits. The OFCC accepts as complying with its guidelines any plan under which:

> . . . [the employer's] contributions are the same for men and women or if the resulting benefits are equal (41 C.F.R. §60.20.3).

The EEOC guidelines, however, are specific and stringent. They do not leave the choice of retirement plan entirely to the employer. Instead, they state:

> It shall be unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or *which differentiates in benefits on the basis of sex* [emphasis added] (29 C.F.R. §1604.9(f)).

and

> It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other (29 C.F.R. §1604.9 (e)).

[12] The college also charges that the Equal Pay Act does not apply to colleges and universities under the commerce clause of the U.S. Constitution.

The TIAA-CREF pension plan in use at most colleges and universities is in compliance with OFCC guidelines because it is a "money purchase-plan" in which the employer makes pension contributions to the pension fund for men or women earning equal salaries. At retirement, similarly situated men and women have therefore accumulated the same amount of pension funds, but their choice of options may result in different monthly benefits. Similarly situated men and women who elect the single-life option receive different monthly payments based on actuarial tables that show women on the average live four years longer than men. The women's monthly pension rate is therefore lower. This situation may violate the EEOC's equal benefits requirement.

Supporters of TIAA-CREF's current payment system do not find that the use of actuarial tables to determine monthly benefits is discriminatory. Instead, they see it as a necessary business mechanism:

> . . . [actuarial tables based on statistically valid morality rates and the laws of probability] are a two factor method of separating annuitants by expected duration of payments (Edwards 1974, p. 19).

Further, supporters of the current approach are opposed to higher employer contributions to women's pension funds because women already have an advantage in the total benefits funds (e.g., lower insurance rates) and additional monies to women's funds would only add to this imbalance (Steinbach and Reback 1974). To provide "topping up" funds so that women would receive monthly benefits equal to their male counterparts, an institution would have to add another 10 percent to 13 percent annually to the contributions now made, a national cost of $12 to $16 million annually based on the present level of contributions (Steinbach and Reback 1974).

The EEOC does not accept the use of actuarial tables as a nondiscriminatory business mechanism. Instead, the EEOC contends that it is a violation of Title VII to apply the average attributes of a class to each individual member of that class (Powell 1974b). Such a use of class attributes may be valid only if "all or substantially all" of the individual class members possess the attribute (Powell 1974b, p. 5, citing *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969), and there is evidence that a substantial portion of women pensioners do not live to their actuarial life expectancy. A TIAA-CREF report on female mortality for 1965-1970 shows that only 25 percent of their women pensioners lived to collect the "equal total benefit" (Office of Women 1974, p. 2). Another study finds that there is an "overlap" of

84 percent of men and women who, if followed from the age of 65, have an identical age at death. Thus, 16 percent of the women die later than this group and 16 percent of the men die earlier (Bergman 1974).

It is probable that the legitimacy of TIAA-CREF's current pension system will be resolved by the courts in cases being brought against it (Edwards 1974), but then the question arises as to what pension system would replace the current system if it is found to be in violation of Title VII. Considerations involved in replacing the present money purchase plan would have to include the cost to the employer of the new system, the impact on male benefits, any potential impact on the hiring of women employees, and the effect of the new system on those employees and retirees who invested in the old system.[13]

One alternative pension system to be considered is the "formula benefit plan" already in use in most private industry and public retirement systems (Steinbach and Reback 1974). This plan pays out equal periodic benefits to men and women based on a computation involving, for example, 1 percent of the final five-year average salary for each year of the annuitant's lifetime, and therefore an employer must contribute more to the fund for women employees in order to accumulate the larger amount of money necessary to pay out benefits over a longer period of time (Edwards 1974). From the EEOC's point of view, the higher cost of such a pension program would not prevent the implementation of the plan unless affected colleges and universities could demonstrate that business necessity required maintaining the status quo. Such proof would require "a showing that the suspect conduct is necessary to the safe and efficient operation of the business" (Powell 1974, p. 7).

Colleges and universities may not be able to sustain the increased costs of a formula benefit pension plan, and may instead turn to the other major proposed alternative to the current system, i.e., the "unisex table." This approach would still allow faculty to use a money purchase retirement system, but monthly benefits would be based on an actuarial table that combines the mortality rates for men and women. To implement the unisex table pension plan, either all contributors would have to pay a higher rate to increase women's benefits

[13] It should be noted that if a male employee chooses a joint life option, his benefits will be reduced to compensate for his wife's longer life expectancy; a female employee choosing a joint life option will not have her stipend reduced because her spouse's life expectancy is shorter (Bernstein and Williams 1974).

so that they would equal men's on a monthly basis, or men's benefits would have to be brought down while women's are increased (Steinbach and Reback 1974). Such a system would have to operate prospectively, since any decrease in the current level of men's benefits would violate Title VII (Steinbach and Reback 1974). The increased costs of the unisex annuity plan could be mitigated by having the actuarial table reflect the entire pool of participants in TIAA-CREF, thereby spreading the higher costs among all institutions and employees. This would have the advantage of minimizing costs for any institution that hires women faculty (Bernstein and Williams 1974).

Another difficulty, however, may be that under a unisex pension plan men would not live long enough on the average to collect their full retirement contribution because it would be distributed to them at a rate lower than the true male rate, while women would receive more than the true actuarial value of their accumulated pension contributions (Steinbach and Reback 1974). One study, however, questions this reliance on standard actuarial predictions. The study notes:

> . . . the actuarial table should not be mistaken for reality. It merely reflects a selected part of reality. It cannot take into account all the significant variables. . . . The tables are crude guesses about a population with a given age and sex distribution. . . . Actuaries frequently adjust tables to reflect "experience," or the new "reality" (Bernstein and Williams 1974, pp. 255-256).

A further complication is whether a unisex table could be used only for faculty retirement plans, but not for other similar plans. If different systems were used, then insurance companies that used separate male and female actuarial tables and concentrated on businesses with a high percentage of male employees would have the best rates and would attract "the funding of men's retirement benefits away from pension programs and insurance companies having a normal mix of men and women" (Steinbach and Reback 1974, p. 34). Ultimately, federal legislation might have to be enacted to resolve the problem of sex discrimination in retirement benefits, but such legislation might not help those already enrolled in TIAA-CREF, since "topping off" or "averaging out" benefits at the time of retirement may also be illegal under Title VII (Steinbach and Reback 1974).

Maternity Benefits

There also has been federal involvement on the issue of whether pregnancy is a "disability" in the context of disability insurance pro-

grams. Women have challenged the exclusion of pregnancy from disability programs in two major cases, which were brought on different legal bases and have received differing results.

In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court ruled that California's disability program does not violate the Equal Protection Clause[14] when it excludes from insurance benefits normal pregnancy and childbirth. Before the case reached the Court, California amended its program to include disabilities arising from abnormal pregnancies, but retained the restriction on normal pregnancy. The section of California's program that was at issue provides:

> . . . An individual shall be deemed disabled in any day in which, because of physical or mental condition, he is unable to perform his regular or customary work. *In no case shall the term 'disability' or 'disable' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter* (emphasis in original) (484 U.S. at 489).

In the Court's view, the essential question in this case was:

> . . . whether the Equal Protection Clause required [the state's conception of disability insurance] to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery (417 U.S. a 494).

The Court held that the state had a legitimate interest in maintaining a solvent program funded in a way that had minimal adverse effect on low-income employees, and a legitimate interest in distributing benefits at an adequate level. Therefore, the Court did not find that exclusion of normal pregnancy from the state's disability insurance program constituted an invidious discrimination under the Equal Protection Clause. The Court viewed the exclusion of normal pregnancy benefits as simply a state decision to exclude one among several other risks excluded under the program. The court did not find unlawful sex discrimination in such an exclusion:

> There is no evidence in the record that the selection of risks insured . . . worked to discriminate against any definable group or class in terms of the aggregate risk protection derived . . . from that program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not (417 U.S. at 496-497).

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[14] The Fourteenth Amendment provides: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

In a footnote, the Court commented that while only women can become pregnant, all legislative classifications involving pregnancy are not sex-based, *i.e.*, discriminatory. A successful challenge to such a classification would have to show that the classification was a pretext for invidious discrimination against one sex or the other.

In contrast, a recent U.S. court of appeals decision in a Title VII case found that the exclusion of maternity benefits from an employer's disability program violated Title VII, *Wetzel v. Liberty Mutual* (No. 74-1233, 3rd Cir., Feb. 11, 1975). The court of appeals distinguished *Geduldig v. Aiello* by holding that its own decision involved "statutory interpretation" based on the specific commands of Title VII, "rather than . . . constitutional analysis" (9 EPD ¶9942, at p. 6969) in *Geduldig*, which was based on the broader and less rigid requirements of constitutional law. In determining whether a violation had occurred, the court of appeals looked to the legislative history of the Civil Rights Act of 1964, and the implementing guidelines, which it found carry out the legislation's purpose. The guideline in question states:

> Disabilites caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment (29 C.F.R., Ch. 14 §1604.10(b)).

The court of appeals also held that the employer's policy of excluding pregnancy from disability benefits constituted disparate treatment of a protected class, and therefore violated Title VII. In so finding, the court rejected Liberty Mutual's contention that pregnancy should not be a covered disability because it is a voluntary condition, noting that some voluntary disabilities are covered while pregnancy, a condition unique to women, is not. The court also disagreed with the company's argument that its plan only covered disabilities arising from illness, noting that a women's disablement from pregnancy involved loss of income, medical expenses, and probably hospitalization costs, just like other disabilities covered by the company's disability programs.[15] While neither of the two foregoing cases involved college faculty, there is no reason in principle why they would not be relevant to any case arising in that context.

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[15] The employer has filed a petition for certiorari with the Supreme Court.

Conclusion

If a college or university is judged in large part by its faculty, then federal agencies with jurisdiction over faculty employment can fundamentally affect the character of our institutions of higher education. By implementing federal laws and orders, these agencies potentially can bring about major changes in the procedures by which college faculties recruit, hire, and promote their colleagues. Beyond and perhaps more important than procedural changes, university administrators and faculty who confront the issues presented by federal employment requirements must come to understand the changes in attitudes that are necessary to promote true equal employment opportunity. Such changes may range from abandoning personality stereotypes of a "qualified" faculty member, to the recognition that practices neutral on their face may be discriminatory in their effect. Ultimately, faculty ranks may be filled by people who represent a wider range of viewpoints, backgrounds, and experiences.

The federal laws and orders most directly involved in these changes are Title VII, Executive Order 11246, as amended, and the Equal Pay Act (the effects of Title IX will not be known for some time, and the post-Civil War civil rights laws are most useful in remedying individual complaints). These laws and orders grant the responsible federal agencies the power to examine and challenge the standards by which colleges and universities evaluate and employ their faculty, from initial hiring through promotion, to tenure. Moreover, since federal guidelines are designed for all fields of employment, college and university administrators often find it difficult to apply requirements intended for nonprofessional employees to the college faculty employment situation. They therefore seek to have federal agencies develop guidelines that will be more compatible with faculty employment problems. But whatever standards prevail, colleges found to violate federal requirements will have to change their practices. These changes will be costly to colleges and universities that will have to provide accountability to federal agencies through bureaucratic procedures, and implement changes to meet federal standards, such as providing equal pay to similarly situated employees, or providing equal fringe benefits.

The interaction between higher education institutions and federal agencies occurs at a slow pace, hampering the entire equal employ-

ment effort. Equal employment opportunity may be further slowed because of economic considerations beyond the control of institutions or agencies. Critics and advocates of federal involvement in the faculty employment process therefore will have to monitor activity in this field for the foreseeable future.

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Federal Laws[1] and Regulations Concerning Sex Discrimination in Educational Institutions[2]

Compiled October 1972 by Project on the Status and Education of Women, Association of American Colleges. See page 52 for footnotes.

	Executive Order 11246 as amended by 11375	Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972
Effective date	Oct. 13, 1968	March 24, 1972 (July 1965 for non-professional workers.) (Institutions with 15-24 employees are not covered until March 24, 1973.)
Which institutions are covered	All institutions with federal contracts of over $10,000.	All institutions with 15 or more employees.
What is prohibited[3]	Discrimination in employment (including hiring, upgrading, salaries, fringe benefits, training, and other conditions of employment) on the basis of race, color, religion, national origin or sex. Covers all employees.	Discrimination in employment (including hiring, upgrading, salaries, fringe benefits, training, and other conditions of employment) on the basis of race, color, religion, national origin or sex. Covers all employees.
Exemptions from coverage	None.	Religious institutions are exempt with respect to the employment of individuals of a particular religion or religious order (including those limited to one sex) to perform work for that institution. (Such institutions are not exempt from the prohibition of discrimination based on sex, color, and national origin.)
Who enforces the provisions?	Office of Federal Contract Compliance (OFCC of the Department of Labor has policy responsibility and oversees federal agency enforcement programs. OFCC has designated HEW as the Compliance Agency responsible for enforcing the Executive Order for all contracts with educational institutions. HEW's Office for Civil Rights (Division of Higher Education) conducts the reviews and investigations.	Equal Employment Opportunity Commission (EEOC).[4]
How is a complaint made?	By letter of OFCC or Secretary of HEW.	By a sworn complaint form, obtainable from EEOC.

Equal Pay Act of 1963 as amended by the Education Amendments of 1972 (Higher Education Act)	**Title IX of the Education Amendments of 1972** (Higher Education Act)[17]	**Title VII (Section 799A) & Title VIII (Section 845) of the Public Health Service Act** as amended by the Comprehensive Health Manpower Act & the Nurse Training Amendments Act of 1971.[18]
July 1, 1972 (June, 1964, for non-professional workers.)	July 1, 1972 (Admissions provisions effective July 1, 1973.)	Nov. 18, 1971
All institutions.	All institutions receiving federal monies by way of a grant, loan, or contract (other than a contract of insurance or guaranty).	All institutions receiving or benefiting from a grant, loan guarantee, or interest subsidy to health personnel training programs or receiving a contract under Title VII or VIII of the Public Health Service Act.[19]
Discrimination in salaries (including almost all fringe benefits) on the basis of sex. Covers all employees.	Discrimination against students or others[11] on the basis of sex.[11]	Discrimination in admission of students on the basis of sex and against some employees.[20]
None.	Religious institutions are exempt if the application of the anti-discrimination provisions are not consistent with the religious tenets of such organizations. Military schools are exempt if their primary purpose is to train individuals for the military services of the U.S., or the merchant marines. Discrimination in admissions[20] is prohibited only in vocational institutions (including vocational high schools), graduate and professional institutions, and public undergraduate coeducational institutions.	None.
Wage and Hour Division of the Employment Standards Administration of the Department of Labor.	Federal departments and agencies which are empowered to extend financial aid to educational programs and activities. HEW's Office for Civil Rights (Division of Higher Education) is expected to have primary enforcement powers to conduct the reviews and investigations.[11]	HEW's Office for Civil Rights (Division of Higher Education) conducts the reviews and investigations.
By letter, telephone call, or in person to the nearest Wage and Hour Division office.	Procedure not yet specified. A letter to Secretary of HEW is acceptable.	Procedure not yet specified. A letter to Secretary of HEW is acceptable.

Continued next page

Federal Laws and Regulations Concerning Sex Discrimination — (Continued)

	Executive Order 11246 as amended by 11375	Title VII of the Civil Rights Act of 1954 as amended by the Equal Employment Opportunity Act of 1972
Can complaints of a pattern of discrimination be made as well as individual complaints	Yes. However, individual complaints are referred to EEOC.	Yes.
Who can make a complaint?[a]	Individuals and/or organizations on own behalf or on behalf of aggrieved employee(s) or applicant(s).	Individuals and/or organizations on own behalf or on behalf of aggrieved employee(s) or applicant(s). Members of the commission may also file charges.
Time limit for filing complaints[b]	180 days.	180 days.
Can investigations be made without complaints?	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints. Preaward reviews are mandatory for contracts over $1,000,000.	No. Government can conduct investigations only if charges have been filed.
Can the entire institution be reviewed?	Yes. HEW may investigate part or all of an institution.	Yes. EEOC may investigate part or all of an establishment.
Record keeping requirements and government access to records	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.
Enforcement power and sanctions	Government may delay new contracts, revoke current contracts, and debar institutions from eligibility for future contracts.	If attempts at conciliation fail, EEOC or the U.S. Attorney General may file suit.[c] Aggrieved individuals may also initiate suits. Court may enjoin respondent from engaging in unlawful behavior, order appropriate affirmative action, order reinstatement of employees, and award back pay.
Can back pay be awarded?[d]	Yes. HEW will seek back pay only for employees who were not previously protected by other laws allowing back pay.	Yes. For up to two years prior to filing charges with EEOC.

qual Pay Act of 1963 s amended by the Education mendments of 1972 (Higher ducation Act)	**Title IX of the Education Amendments of 1972** Higher Education Act)[13]	**Title VII (Section 799A) & Title VII (Section 845) of the Public Health Service Act** as amended by the Comprehensive Health Manpower Act & the Nurse Training Amendments Act of 1971[14]
es.	Yes.	Yes.
ndividuals and/or organizations n own behalf or on behalf of ggrieved employee(s).	Individuals and/or organizations on own behalf or on behalf of aggrieved party.	Individuals and/or organizations on own behalf or on behalf of aggrieved party.
lo official limit, but recovery of ack wages is limited by statute f limitations to two years for a on-willful violation and three ears for a willful violation.	Procedure not yet determined.	Procedure not yet determined.
es. Government can conduct eriodic reviews without a re- orted violation as well as in re- ponse to complaints.	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints.	Yes. Government can conduct periodic reviews without a reported violation, as well as in response to complaints.
es. Usually the Wage-Hour Di- sion reviews the entire estab- shment.	Yes. HEW may investigate those parts of an institution which receive federal assistance (as well as other parts of the institution related to the program, whether or not they receive direct federal assistance). If the institution receives general institutional aid, the entire institution may be reviewed.	Yes. HEW may investigate those parts of an institution which receive federal assistance under Title VII and VIII (as well as other parts of the institution related to the program, whether or not they receive assistance under these titles).
nstitution must keep and pre- erve specified records relevant o the determination of whether iolations have occurred. Gov- rnment is empowered to review ll relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.	Institution must keep and preserve specified records relevant to the determination of whether violations have occurred. Government is empowered to review all relevant records.
voluntary compliance fails,[15] ecretary of Labor may file suit. ggrieved individuals may initi- te suits when Department of abor has not done so. Court ay enjoin respondent from en- aging in unlawful behavior, and rder salary raises, back pay nd assess interest.	Government may delay new awards, revoke current awards and debar institutions from eligibility for future awards. Department of Justice may also bring suit at HEW's request.	Government may delay new awards, revoke current awards and debar institutions from eligibility for future awards. Department of Justice may also bring suit at HEW's request.
es. For up to two years for a on-willful violation and three ears for a willful violation.	Probably, to the extent that employees are covered.	Probably, to the extent that employees are covered.

Continued next page

Federal Laws and Regulations Concerning Sex Discrimination — (Continued)

	Executive Order 11246 as amended by 11375	Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972
Affirmative action requirements (There are no restrictions against action which is non-preferential)	Affirmative action plans (including numerical goals and timetables) are required of all contractors with contracts of $50,000 or more and 50 or more employees.[5]	Affirmative action is not required unless charges have been filed, in which case it may be included in conciliation agreement or be ordered by the court.
Coverage of labor organizations	Any agreement the contractor may have with a labor organization can not be in conflict with the contractor's affirmative action commitment.	Labor organizations are subject to the same requirements and sanctions as employers.
Is harassment prohibited?	Institutions are prohibited from discharging or discriminating against any employee or applicant for employment because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions are prohibited from discharging or discriminating against any employee or applicant for employment because he/she has made a complaint, assisted with an investigation or instituted proceedings.
Notification of complaints	Notification of complaints has been erratic in the past. HEW is proposing notifying institutions of complaints within 10 days. HEW notifies institutions a few weeks prior to investigation.	EEOC notifies institutions of complaints within 10 days.
Confidentiality of names	Individual complaint's name is usually given to the institution. Investigation findings are kept confidential by government but can be revealed by the institution. Policy concerning government disclosure concerning investigations and complaints has not yet been issued. The aggrieved party and respondent are not bound by the confidentiality requirement.	Individual complainant's name is divulged when an investigation is made. Charges are not made public by EEOC, nor can any of its efforts during the conciliation process be made public by the commission or its employees. If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.
For further information, contact	Division of Higher Education Office for Civil Rights Department of HEW Washington, D.C. 20201 or Office of Federal Contract Compliance Employment Standards Administration Department of Labor Washington, D.C. 20210 or Regional HEW or DOL Office	Equal Employment Opportunity Commission 1800 G Street, N.W. Washington, D.C. 20506 or Regional EEOC Office

qual Pay Act of 1963 s amended by the Education mendments of 1972 (Higher ducation Act)	Title IX of the Education Amendments of 1972 (Higher Education Act)[12]	Title VII (Section 799A) & Title VIII (Section 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act & the Nurse Training Amendments Act of 1971[13]
ffirmative action, other than lary increases and back pay, not required.	Affirmative action may be required after discrimination is found.	Affirmative action may be required after discrimination is found.
abor organizations are pro- ibited from causing or attempt- g to cause an employer to iscriminate on the basis of sex. mplaints may be made and uits brought against these rganizations.	Procedure not yet clear. Any agreement the institution may have with a labor organization can not be in conflict with the non-discrimination provisions of the legislation.	Procedure not yet clear. Any agreement the institution may have with a labor organization can not be in conflict with the non-discrimination provisions of the legislation.
nstitutions are prohibited from scharging or discriminating gainst any employee because e/she has made a complaint, ssisted with an investigation r instituted proceedings.	Institutions will be prohibited from discharging or discriminating against any participant or potential participant because he/she has made a complaint, assisted with an investigation or instituted proceedings.	Institutions will be prohibited from discharging or discriminating against any participant or potential participant because he/she has made a complaint, assisted with an investigation or instituted proceedings.
omplaint procedure is very in- rmal. Employer under review ay or may not know that a olation has been reported.	Procedure not yet determined.	Procedure not yet determined.
he identity of a complainant s well as the employer (and nion, if involved), is kept in trict confidence.[12] If court ction becomes necessary, the dentity of the parties involved ecomes a matter of public ecord. The aggrieved party and espondent are not bound by he confidentiality requirement.	Identity of complainant is kept confidential if possible. If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.	Identity of complainant is kept confidential if possible. If court action becomes necessary, the identity of the parties involved becomes a matter of public record. The aggrieved party and respondent are not bound by the confidentiality requirement.
Wage and Hour Division Employment Standards Administration Department of Labor Washington, D.C. 20210 or Field, Area, or Regional Wage and Hour Office	Division of Higher Education Office for Civil Rights Department of HEW Washington, D.C. 20201 or Regional HEW Office	Division of Higher Education Office for Civil Rights Department of HEW Washington, D.C. 20201 or Regional HEW Office

FOOTNOTES

General

1. State employment and or human relations laws may also apply to educational institutions. The Equal Rights Amendment to the U.S. Constitution, passed by the Congress and now in the process of ratification would, when ratified, forbid discrimination in publicly supported schools at all levels, including students and faculty.

2. Unless other wise specified, "institution" includes public and private colleges and universities, elementary and secondary schools, and preschools.

3. A bona fide seniority or merit system is permitted under all legislation, provided the system is not discriminatory on the basis of sex or any other prohibited ground.

4. There are no restrictions against making a complaint under more than one anti-discrimination law at the same time.

5. This time limit refers to the time between an alleged discriminatory act and when a complaint is made. In general, however, the time limit is interpreted liberally when a continuing practice of discrimination is being challenged, rather than a single, isolated discriminatory act.

6. Back pay cannot be awarded prior to the effective date of the legislation.

Executive Order 11246 as amended by 11375

7. The definition of "contract" is very broad and is interpreted to cover all government contracts (even if nominally entitled "grants") which involve a benefit to the federal government.

8. As of January 19, 1973, all covered educational institutions, both public and private, must have written affirmative action plans.

Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act

9. In certain states that have fair employment laws with prohibitions similar to those of Title VII, EEOC automatically defers investigation of charges to the state agency for 60 days. (At the end of this period, EEOC will handle the charges unless the state is actively pursuing the case. About 85 per cent of deferred cases return to EEOC for processing after deferral.)

10. Due to an ambiguity in the law as it relates to public institutions, it is not yet clear whether EEOC or the Attorney General will file suit in all situations which involve public institutions.

Equal Pay Act of 1963 as amended by the Education Amendments of 1972 (Higher Education Act)

11. Over 95 per cent of all Equal Pay Act investigations are resolved through voluntary compliance.

12. Unless court action is necessary, the name of the parties need not be revealed. The identity of a complainant or a person furnishing information is never revealed without that person's knowledge and consent.

Title IX of the Education Amendments of 1972
(Higher Education Act)
(Minority women are also protected from discrimination on the basis of their race or color by Title VI of the Civil Rights Act of 1964.)

13. Final regulations and guidelines for Title IX of the Education Amendments of 1972 have not yet been published. This chart includes information which is explicitly stated in the law, as well as how the law is likely to be in-

terpreted in light of other precedents and developments.

14. The sex discrimination provision of Title IX is patterned after Title VI of the Civil Rights Act of 1964, which forbids discrimination on the basis of race, color and national origin in all federally assisted programs. By specific exemption, the prohibitions of Title VI do not cover employment practices (except where the primary obejective of the federal aid is to provide employment). However, there is no similar exemption for employment in Title IX.

15. Title IX states that: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance. . . ."

16. The following are exempted from the admissions provision:

Private undergraduate institutions.

Elementary and secondary schools other than vocational schools.

Single-sex public undergraduate institutions. (If public single-sex undergraduate institutions decide to admit both sexes, they will have 7 years to admit female and male students on a nondiscriminatory basis, provided their plans are approved by the Commissioner of Education.)

Note 1. *These exemptions apply to admissions only.* Such institutions are still subject to all other anti-discrimination provisions of the Act.

Note 2. Single-sex professional, graduate and vocational schools at all levels have until July, 1979, to achieve nondiscriminatory admissions, provided their plans are approved by the Commissioner of Education.

17. Under Title VI of the 1964 Civil Rights Act, which Title IX of the Education Amendments closely parallels, federal agencies which extend aid to educational institutions have delegated their enforcement powers to HEW. A similar delegation of enforcement power is expected under Title IX.

Title VII & Title VIII of the Public Health Service Act as amended by the Comprehensive Health Manpower Act & the Nurse Training Amendments Act of 1971

18. Final regulations and guidelines for Title VII and VIII of the Public Health Service Act have not yet been published. This chart includes information which is explicitly stated in the law, as well as how the law is likely to be interpreted in light of other precedents and developments.

19. Schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing are specifically mentioned in Titles VII and VIII. Regulations issued June 1, 1972, by the Secretary of HEW specify that all entities applying for awards under Titles VII or VIII are subject to the nondiscrimination requirements of the act.

20. HEW regulations state: "Nondiscrimination in admission to a training program includes nondiscrimination in all practices relating to applicants to and students in the program; nondiscrimination in the enjoyment of every right, privilege and opportunity secured by admission to the program; and nondiscrimination in all employment practices relating to employees working directly with applicants to or students in the program."